

Art Law Gallery

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["I-Arts" Viva La Revolución Digital](#)

Whether iPhone, blackberry, or droid, the smartphone has become the modern day Swiss Army knife. Now, with the help of these ubiquitous gadgets, artists, collectors and institutions are modernizing the ways in which to interact with art. With a swipe of a finger, one can bid on a work at auction; finger paint with the “brushes” app; or even *quelle horreur* view Mona Lisa on the Louvre’s app! While the smartphone will never (nor should it) take the place of pencils, brushes and paints entirely, digital media can be used thoughtfully to give useful shape to the art of the present. Moving forward with digitization, it is important for creative organizations to consider the key intellectual property concerns at issue when developing an iPhone app. By considering each of these issues in concert with skilled legal counsel as necessary, the art community will be well on its way to avoiding the most common and costly legal mistakes.

1) Selecting a Name for Your App is an Art

In choosing a unique and trademark-protectable name for your app, it is important to choose a name that is both non-descriptive and unlike any other trademarks currently in use. In fact, take a page from John Baldessari’s famous credo: “I will not make any more boring art.” First, while it may seem attractive to select a name that describes some aspect of the software, such names are not only less distinctive but, as a result, much more difficult to protect as trademarks. Trademark law generally does not protect words or phrases that merely describe the products they are used with – the theory is that others in the industry should have a fair chance to use such words to describe their own products. Accordingly, the law provides greater protection to names that are fanciful and distinctive. Equally important in selecting your app name and establishing your trademark rights is choosing a name that is not similar to any other trademarks currently in use.

The permissible level of similarity between one trademark and another depends on several factors. The most important factor is the similarity of the marks and the similarity of the goods or services offered in connection with each mark. Thus, once you have chosen a couple name options that fit the first criteria, the next step should be a search for potential trademark problems. As a rule of thumb, you should begin with a Google search and a look through the iTunes App Store. But your search for potential trademark problems should not end at the App Store. The US Patent and Trademark [Office](#) hosts a database of trademarks that are either registered or the subject of a pending application. Finally, make sure that the crux of your creative digital project, the digital domain name, is available for your app. Fortunately, the beneficial byproduct of a unique app name is ultimately an easier domain name to obtain. Moving forward, it is important to consult with experienced trademark attorneys who can provide thorough searching capabilities and will be able to analyze the results in terms of your legal risk profile.

2) Copyright and Moral Rights: cross your t’s and dot your i’s

When creating digital art apps for art museums, galleries and businesses, copyright considerations are paramount, since the most handsome and dynamic app will provide the viewer with the ability to flip through and engage with an extensive collection of images. Problematically, the transfer of a physical object, be it a

photo negative or a painting, does not carry with it the underlying copyright. One who purchases or displays a work of art, therefore, does not gain the exclusive rights to reproduce the work or prepare derivative works based on it. Conversely, a transfer of copyright does not require a conveyance of the material object. One can own the exclusive rights to reproduce a Picasso, for instance, without ever holding the magnificent original in one's hands. In order for the transfer of a work of art to carry the copyright within, it requires a written conveyance of the specific rights being granted. Thus, for the digital publication of art images, an express written agreement is necessary, either a transfer or a grant of license. Some institutions use a limited nonexclusive license, others try to obtain all rights when acquiring a contemporary artist's work. To determine your rights in the digitization of images it is important to consult with a skilled attorney before going forward with development.

The copyright code also imposes a few additional hurdles and safeguards for app creators. First, by abiding by the Digital Millennium Copyright Act's "Safe Harbor" provisions, app creators can minimize their exposure to liability for the actions of their users (this is particularly relevant when users can upload content of their own via the app). Next, the Visual Artist's Right of Attribution and Integrity or "VARA" protects visual artists by providing them with the right to claim authorship of their work and to obtain damages if their work is distorted or modified in such a way that would be prejudicial to the artist's honor or reputation. VARA may pose a challenge for app creators because a misattributed piece of artwork or a distorted online image could *potentially* violate the visual artist's rights. For example, John Baldessari, who will turn 80 next year, recently debuted an iPhone [app](#) riffing off of Abraham van Beyeren's oil *Banquet Still Life* at his retrospective at the Los Angeles Museum of Contemporary Art (LACMA). Reminiscent of traditional still-life painting exercises, the engaging app allows you to re-arrange and move gleaming lobsters, oysters and assorted fruits without lifting a brush. In this situation, let's say that Van Beyeren had transferred the ownership of the work and the copyright to LACMA—would moral rights be transferred as well? No, it does not matter that the artist is not the copyright proprietor, the rights of attribution and integrity are personal to the artist and separate from the economic rights of copyright.

Whether or not an artist's moral rights will be violated by your app will depend largely on its functionality. While digitally shrinking an image for your app may not violate the visual artist's rights, rearranging the subject matter as seen above in *Banquet Still Life*, very well could be a VARA violation. Regardless, a prudent art app developer will make sure to obtain a signed waiver by the artist specifying the identity of the work and the uses to which the waiver applies. Again, whether either of these aspects of copyright law apply to your app will depend largely on its digital permutations and you should make sure to consult with skilled intellectual property counsel every step of the design and testing process.

3) Follow Apple's rules

Apple's App Store is the gold standard for successful distribution of an art app. Thus, you should make sure your app meets the [requirements](#) for inclusion in Apple's store and accordingly, utilize and agree to the terms of Apple's legal agreement governing such use. For the first time Apple has published detailed guidelines for its app review process, which are invaluable, in addition Apple's terms for using the iPhone Software Developer Kit as well as for participating in the App Store and all other services required to build apps, are contained in the iPhone Developer Program License Agreement. A few key issues to be aware of: privacy rights, location based services, and objectionable content. Privacy laws prevent the dissemination of user data and information to third parties. All apps that require user's personal information, for example, to perhaps purchase items from a museum store or to bid using an auction app, must comply with all applicable privacy and data collection laws, this includes state, federal and international laws. If your program uses location, identity or other data, it is necessary to review the laws that may apply to your app. In some cases it will be necessary to inform users prior to purchase of the use of their information in connection with the app. As for objectionable content, Apple prohibits apps that are violent, pornographic, or "defamatory, offensive or mean-spirited." Apple perhaps puts it best in the recently released App Store Guidelines, "We will reject Apps for any content or behavior that we believe is over the line. What line, you ask? Well as a Supreme Court Justice once said, 'I'll know it when I see

it'. And we think that you will also know it when you cross it." Creativity and innovation are key touchstones in developing your app, but failing to comply with Apple's rules will mean significant delays or possibly outright denial of your app. This article only provides a snap shot, thus please take the time to review the guidelines and license agreement in depth.

4) Protecting your app

Once your app is created, you should protect your work against misappropriation or infringement by others. In the United States, copyright ownership is automatically obtained upon the physical creation of a copyrightable work—writing a manual, saving a text file containing a code, recording a musical composition, or drawing a sketch on paper are all acts that give rise to ownership of copyright.

However, in order to assert your copyright against an alleged infringer in court, you must first register your copyright. While it is possible to obtain an expedited registration in the eleventh hour before filing a lawsuit, the process is quite expensive and certain rights maybe lost if you do not have a registration in hand prior to the occurrence of an alleged infringement. Thus, it is highly recommended that you obtain a copyright registration for the app. Further, as the app matures and new developments and features are added, any significant updates to the software should be the subject of new registration.

At the end of the day, La Revolución Digital has begun with a vengeance. In fact, the Piere Bergé—Yves Saint Laurent Foundation in Paris recently debuted a show of "iHockneys" by the prolific artist who has embraced the medium, so keen is his illusion of handling actual pigments while yielding the Brushes app, he sometimes reflexively "wipes" off his thumb on his clothing. Technology presents an innovative platform to connect with the public, advance your institution's "brand" identity, and attract and engage a new audience.